

- CHAPTER THREE -

PRE-BRIEFING RESPONSIBILITIES

- RECORD COMPLETION -

- EXTENSIONS OF TIME -

- RELEASE ON APPEAL -

ADI APPELLATE PRACTICE MANUAL
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[See Table of Contents](#)

[Go to Main Text](#)

TABLE OF CONTENTS
(with hyperlinks to lead subdivisions)

- I. **INTRODUCTION** [§ 3.0]

- II. **ENSURING AN ADEQUATE RECORD** [§ 3.1]
 - A. [Overview](#) [§ 3.2]
 - B. [Normal Record in Criminal Case](#) [§ 3.3]
 - 1. Normal clerk’s transcript [§ 3.4]
 - 2. Normal reporter’s transcript [§ 3.5]
 - 3. Exhibits as part of normal record [§ 3.6]
 - C. [Normal Record in Juvenile Case](#) [§ 3.6A]
 - 1. Normal clerk’s transcript [§ 3.6B]
 - 2. Normal reporter’s transcript [§ 3.6C]
 - 3. Exhibits as part of normal record [§ 3.6D]
 - D. [Confidential Matters in Records](#) [§ 3.7]
 - 1. Juvenile records [§ 3.7A]
 - 2. *Marsden* and related transcripts [§ 3.8]
 - 3. Other confidential records and in camera proceedings from which one or more parties were excluded in the superior court [§ 3.9]
 - 4. Sealed records [§ 3.9A]
 - 5. Improper inclusion of juror identification information and other confidential matters in record [§ 3.10]
 - E. [Request for Additional Record Before Certification to the Reviewing Court](#) [§ 3.11]
 - F. [Correcting/Completing and Augmenting Record After It Is Filed in Reviewing Court](#) [§ 3.12]
 - 1. Correcting omissions from normal record [§ 3.13]
 - a. Examples of often omitted materials [§ 3.14]
 - b. Correction procedure [§ 3.15]
 - c. Changes in judgment or other new orders made during appeal [§ 3.16]
 - 2. Augmenting the record after it is filed in reviewing court [§ 3.17]
 - a. Timing of request [§ 3.18]
 - b. Identification of materials in request [§ 3.19]
 - c. Explanation of need for materials [§ 3.20]
 - d. Concurrent request for extension of time [§ 3.21]
 - e. Formal requirements [§ 3.22]
 - f. Changes in judgment or other new orders made during appeal [§ 3.23]
 - 3. Combining requests for correction and augmentation [§ 3.24]

- G. [Getting Exhibits Before the Reviewing Court](#) [§ 3.25]
 - 1. Attachment to brief [§ 3.26]
 - 2. Transmission under rule 8.224 [§ 3.27]
- H. [Agreed and Settled Statements and Motion for New Trial](#) [§ 3.28]
 - 1. Agreed statement [§ 3.29]
 - 2. Settled statement [§ 3.30]
 - 3. Motion for new trial under Penal Code section 1181, subdivision 9 [§ 3.31]

III. REQUESTS FOR EXTENSION OF TIME [§ 3.32]

- A. [Number of Extensions](#) [§ 3.33]
- B. [Grounds for Extension](#) [§ 3.34]
- C. [Extensions Pending Augmentation or Correction of the Record](#) [§ 3.35]
- D. [Contents and Form of Extension Request](#) [§ 3.36]

IV. RELEASE PENDING APPEAL [§ 3.37]

- A. [Standards](#) [§ 3.38]
 - 1. Eligibility for release [§ 3.39]
 - 2. Considerations for court in exercising discretion whether to grant release pending appeal [§ 3.40]
 - a. Defendant is not likely to flee [§ 3.41]
 - b. Defendant poses no danger [§ 3.42]
 - c. Appeal is good-faith and substantial [§ 3.43]
- B. [Procedures](#) [§ 3.44]
 - 1. Initial application in superior court [§ 3.45]
 - 2. Application in the appellate court [§ 3.46]
- C. [Considerations in Deciding Whether To Seek Release Pending Appeal](#) [§ 3.47]

**PRE-BRIEFING RESPONSIBILITIES:
RECORD COMPLETION, EXTENSIONS OF TIME, RELEASE ON APPEAL**

I. INTRODUCTION [§ 3.0]

This chapter addresses three critical responsibilities of appellate counsel before the opening brief is filed. First, counsel must ensure the record is complete. Second, when it is not possible to complete research and briefing in the time permitted, counsel must seek one or more extensions. Third, if the client wants and is eligible for bail or other form of release pending appeal, counsel should investigate that possibility and take needed action.¹

Many of the procedures discussed in this chapter require a motion. ADI provides guidance on motions at [Motion Practice in the Fourth Appellate District Pertaining to Criminal and Juvenile Cases](#).²

¹Information about filing and service requirements for documents discussed in this chapter is on the ADI website Filing and Service charts.

http://www.adi-sandiego.com/practice/filing_service_chart.asp . The charts cover both electronic and paper documents. The appellate project or court clerk’s office should be consulted. Up-to-date information on Fourth District practices is on the Supreme Court and Courts of Appeal website. (<http://www.courts.ca.gov/courts.htm>) See the ADI website for information on electronic service.

(http://www.adi-sandiego.com/practice/eservice_adi.asp and http://www.adi-sandiego.com/practice/service_quick_reference.asp)

²http://www.adi-sandiego.com/news_alerts/pdfs/2012/Motion_Practice_2.pdf

CAVEAT: The Supreme Court and all Courts of Appeal are moving, at different paces, toward wholly electronic filing. Counsel must always check with the project, court clerk’s office, or [court website](#)³ to determine whether electronic filing is available or mandatory in the particular court. If so, that procedure would supersede the rules for paper filings.

ADI’s [electronic service](#)⁴ web page and [the home page CHEAT SHEET](#)⁵ provide information about the ADI email service program.

II. ENSURING AN ADEQUATE RECORD [§ 3.1]

Appellate counsel has the responsibility to ensure a complete record, in order to permit identification of all arguable issues and provide the necessary factual foundation for the issues raised. (*People v. Barton* (1978) 21 Cal.3d 513, 518-520; *People v. Silva* (1978) 20 Cal.3d 489; *People v. Gaston* (1978) 20 Cal.3d 476; *People v. Harris* (1993) 19 Cal.App.4th 709, 714; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393-394.)

A. Overview [§ 3.2]

California Rules of Court, rule 8.320 describes the “normal record” on appeal in a criminal case – that is, the record to be prepared automatically by the superior court. Rule 8.407 is the juvenile counterpart. The normal record consists of the documents and transcripts of oral proceedings typically needed in the majority of appeals.

³<http://www.courts.ca.gov/courtsofappeal.htm>. Each Court of Appeal has a tab for “Electronic Filing” or “Electronic Filing / Submissions” that provides current guidance.

⁴http://www.adi-sandiego.com/practice/eservice_adi.asp

⁵<http://www.adi-sandiego.com/index.asp>

The normal record is not necessarily adequate for every case. Occasionally because of clerical oversight or other problem, the prepared record lacks something that under the rules should be in the normal record. Sometimes the normal record as defined in the rules does not include the material necessary to argue an issue and needs either a pre-certification request for additional record (usually the task of trial counsel) or post-certification augmentation. Sometimes part of a record may have been lost or destroyed. Occasionally the appellate court's personal inspection of an exhibit is needed. When it is important for the court to consider matters occurring outside of the present proceedings, such as past appeals in the case, a motion for judicial notice (Cal. Rules of Court, rule 8.252(a)) or very occasionally for new evidence on appeal (rule 8.252(c); Code Civ. Proc., § 909; cf. *In re Zeth S.* (2003) 31 Cal.4th 396) may be required.⁶

While under California Rules of Court, rules 8.336(h) and 8.409(c) ensuring prompt preparation of the record is the responsibility of the Court of Appeal rather than counsel, to protect the client counsel should monitor the process and call attention to delays so prolonged as to suggest the case may have slipped through the cracks.

Throughout the appeal, especially in juvenile cases, appellate counsel should stay in touch with trial counsel. Proceedings in the trial court may take place that affect the scope and nature of the appeal. Trial counsel may also be able to provide documents not in the record that appellate counsel should consider.

B. Normal Record in Criminal Case [§ 3.3]

Under rule 8.320(a) of the California Rules of Court, the normal record in a criminal appeal by the defendant (or in a People's appeal from the granting of a new trial) consists of the clerk's transcript and the reporter's transcripts. Juvenile records are treated in § [3.6A](#) et seq., *post.*)

1. Normal clerk's transcript [§ 3.4]

The clerk's transcript is a compilation of selected documents in the case. California Rules of Court, rule 8.320(b) specifies the contents of the normal clerk's transcript in a criminal appeal:

⁶As with all motions, it must be a separately filed document, not part of a brief or petition. (Rule 8.252(a)(1); see also rule 8.54.)

The clerk's transcript must contain:

- (1) The accusatory pleading and any amendment;
- (2) Any demurrer or other plea;
- (3) All court minutes;
- (4) All instructions submitted in writing, each one indicating the party requesting it;
- (5) Any written communication between the court and the jury or any individual juror;
- (6) Any verdict;
- (7) Any written opinion of the court;
- (8) The judgment or order appealed from and any abstract of judgment or commitment;
- (9) Any motion for new trial, with supporting and opposing memoranda and attachments;
- (10) The notice of appeal and any certificate of probable cause filed under rule 8.304(b);
- (11) Any transcript of a sound or sound-and-video recording furnished to the jury or tendered to the court under rule 2.1040;
- (12) Any application for additional record and any order on the application;
- (13) And, if the appellant is the defendant:
 - (A) Any written defense motion denied in whole or in part, with supporting and opposing memoranda and attachments;
 - (B) If related to a motion under (A), any search warrant and return and the reporter's transcript of any preliminary examination or grand jury hearing;
 - (C) Any document admitted in evidence to prove a prior juvenile adjudication, criminal conviction, or prison term. If a record was closed to public inspection in the trial court because it is required to be kept confidential by law, it must remain closed to public inspection in the reviewing court unless that court orders otherwise; and

- (D) The probation officer's report.
- (E) Any court-ordered diagnostic or psychological report required under Penal Code section 1203.03(b) or 1369.

In appeals from orders other than a motion for new trial or a judgment based on a demurrer, a more limited normal clerk's transcript is prescribed. (Cal. Rules of Court, rule 8.320(d).) Limited appeals include orders after judgment affecting a party's substantial rights in criminal cases, such as revocation or modification of probation (both contested and uncontested), resentencing, denials of statutory petitions (e.g., Proposition 47, Pen. Code, § 1016.5), and writ petitions. (See [chapter 2](#), "First Things First: What Can Be Appealed and How To Get an Appeal Started," § 2.60 et seq.) Frequently court clerks do not include what is necessary, requiring a correction of the record. (See § [3.12](#) et seq., *post*, on corrections and augmentations.)

2. Normal reporter's transcript [§ 3.5]

The reporter's transcript is a verbatim record of selected oral proceedings in the superior court. California Rules of Court, rule 8.320(c) specifies the contents of the normal reporter's transcript in a criminal appeal:

The reporter's transcript must contain:

- (1) The oral proceedings on the entry of any plea other than a not guilty plea;
- (2) The oral proceedings on any motion in limine;
- (3) The oral proceedings at trial, but excluding the voir dire examination of jurors and any opening statement;
- (4) All instructions given orally;
- (5) Any oral communication between the court and the jury or any individual juror;
- (6) Any oral opinion of the court;
- (7) The oral proceedings on any motion for new trial;
- (8) The oral proceedings at sentencing, granting or denial of probation, or other dispositional hearing;
- (9) And, if the appellant is the defendant:

- (A) The oral proceedings on any defense motion denied in whole or in part except motions for disqualification of a judge and motions under Penal Code section 995;
- (B) The closing arguments; and
- (C) Any comment on the evidence by the court to the jury.

In appeals from orders other than a motion for new trial or a judgment based on a demurrer, a more limited normal reporter's transcript is prescribed. (Cal. Rules of Court, rule 8.320(d); see § [3.4](#), *ante*, for examples of such proceedings.)

3. Exhibits [§ 3.6]

Under California Rules of Court, rules 8.320(e) and 8.407(e), the record also includes any exhibit admitted in evidence, or refused or lodged; thus counsel may refer to any exhibit in briefing. Unless an exhibit is in the clerk's transcript, however, the court will not have physical access to it. If counsel wants the court to examine an exhibit, it may be transmitted on request under rules 8.224.⁷ § [3.25](#), *post*, treats this topic. Detailed guidance is also set forth [De-mystifying the Exhibit Review Process in Criminal Cases](#)⁸ and on the [ADI Fourth District practice pages](#).⁹

⁷Some courts, such as Division Two of the Fourth District, may prefer other times and methods of transmission; counsel should ask the assigned staff attorney about local variations. Some courts provide a form for requesting exhibits. See ADI Fourth District practice pages. http://www.adi-sandiego.com/practice/fourth_dist.asp

⁸http://www.adi-sandiego.com/news_alerts/pdfs/2010/EXHIBIT-REVIEW-UPDA TED-2010.pdf

⁹http://www.adi-sandiego.com/practice/fourth_dist.asp

C. Normal Record in Juvenile Case [§ 3.6A]

Under rule 8.407 of the California Rules of Court, the normal record in a juvenile appeal, delinquency or dependency, consists of the clerk's transcript and the reporter's transcript.¹⁰

In fast-track cases, the record should arrive by express mail or the equivalent. (Cal. Rules of Court, rule 8.416(c)(2)(B).) Minor's counsel will receive a separate copy. (*Ibid.*)

1. Normal clerk's transcript [§ 3.6B]

Rule 8.407(a) of the California Rules of Court provides:

The clerk's transcript must contain:

- (1) The petition;
- (2) Any notice of hearing;
- (3) All court minutes;
- (4) Any report or other document submitted to the court;
- (5) The jurisdictional and dispositional findings and orders;
- (6) The judgment or order appealed from;
- (7) Any application for rehearing;
- (8) The notice of appeal and any order pursuant to the notice;
- (9) Any transcript of a sound or sound-and-video recording tendered to the court under rule 2.1040;
- (10) Any application for additional record and any order on the application;

¹⁰Local rules and court miscellaneous orders may add materials to the normal record as prescribed by the California Rules of Court. The Fourth Appellate District, Division One, for example, has issued a miscellaneous order adding to both the clerk's and reporter's transcripts in dependency cases.

<http://www.courts.ca.gov/documents/4dca-div1-Juvenile-Transcripts.pdf>

- (11) Any opinion or dispositive order of a reviewing court in the same case and;
 - (12) Any written motion or notice of motion by any party, with supporting and opposing memoranda and attachments, and any written opinion of the court.
2. Normal reporter's transcript [§ 3.6C]

Rule 8.407(b) of the California Rules of Court prescribes the contents of the reporter's transcript in a juvenile appeal:

The reporter's transcript must contain:

- (1) Except as provided in (2), the oral proceedings at any hearing that resulted in the order or judgment being appealed;
- (2) In appeals from dispositional orders, the oral proceedings at hearings on
 - (A) Jurisdiction and disposition; and
 - (B) Any motion by the appellant that was denied in whole or in part; and
- (3) Any oral opinion of the court.

3. Exhibits [§ 3.6D]

Rule 8.407(e) of the California Rules of Court provides for exhibits to be transferred to the Court of Appeal under rule 8.224.¹¹ § 3.25, *post*, treats this topic. Detailed guidance for Fourth District variations on this procedure is set forth on the [ADI Fourth District practice pages](#).¹² (See also [De-mystifying the Exhibit Review Process in Criminal Cases](#)¹³ on the ADI website.)

¹¹Some courts such as Division Two of the Fourth District may prefer other times and methods of transmission; counsel should ask the assigned staff attorney about local variations. Some courts provide a form for requesting exhibits.

¹²http://www.adi-sandiego.com/practice/fourth_dist.asp

¹³http://www.adi-sandiego.com/news_alerts/pdfs/2010/EXHIBIT-REVIEW-UPDA TED-2010.pdf

D. Confidential Matters in Records [§ 3.7]

Some matters of record are to be handled confidentially, by special procedures.¹⁴ These procedures may apply even if the confidential matter is part of the normal record. Counsel should be aware of these matters and the way they are to be handled. (See generally Cal. Rules of Court, rules 8.45-8.47.) Counsel should also guard against disclosure of this material in publicly filed briefs. (See [chapter 5](#), “Effective Written Advocacy: Briefing,” § 5.21.)

1. Juvenile records [§ 3.7A]

Welfare and Institutions Code section 827 makes [juvenile delinquency and dependency records](#)¹⁵ accessible only to the parties and their attorneys and enumerated others, and section 676 makes court hearings confidential, except in specified circumstances.¹⁶ Rule 8.401 of the California Rules of Court makes appellate records and briefs accessible only to the court, parties, appellate projects, and others designated by the court. It also requires additional steps to protect confidentiality, such as the use of first name and last initial, or just initials.

Some materials may be protected still further, such as psychological reports applicable to only one parent, to which other parties are denied access. The caregiver’s address is confidential unless the juvenile court or the caregiver has authorized it to be

¹⁴The ADI website offers more extensive guidance on confidential records at http://www.adi-sandiego.com/practice/conf_records.asp . See also “Motion Practice in the Fourth Appellate District Pertaining to Criminal and Juvenile cases,” by Anna Jauregui-Law, at http://www.adi-sandiego.com/news_alerts/pdfs/2012/Motion_Practice_2.pdf .

¹⁵http://www.adi-sandiego.com/practice/conf_records.asp#juvrecords.

¹⁶By virtue of its relationship with counsel, the project, such as ADI, is treated as counsel. Accordingly, two divisions of the Fourth District have issued orders giving ADI access to juvenile files: Division [One Misc. Order No. 112812](#) and Division Two [Misc. Orders, No. 15-4](#).

released. (Welf. & Inst. Code § 308 (subd. (a).) Counsel must redact the address¹⁷ so that it is not readable before sending the record to the client. Similarly, counsel should redact social security numbers. (Rule 1.20, subd. (b)(2)(A).)

2. Marsden and related transcripts [§ 3.8]

A *Marsden*¹⁸ transcript will be sent initially only to the Court of Appeal and the defendant's counsel. (Cal. Rules of Court, rule 8.45(d)(2).) If the opening brief raises a *Marsden* issue, the respondent may request a copy of the transcripts under rule 8.47(b)(2)(B). When applicable, the defendant may oppose the request on the ground the transcript contains irrelevant confidential material, citing the pages and line numbers where that material is found. (Rule 8.47(b)(2)(C).) If the defendant files no opposition, the clerk must send the record to the respondent. (Rule 8.47(b)(2)(D).)

Court occasionally use *Marsden*-like procedures for similar defense motions requiring protection against premature disclosure of defense material, such as a defense request for expert funds. *Marsden* issues may be raised in juvenile proceedings, as well. More guidance is available on [ADI's confidential records page](#).¹⁹

Marsden issues occur, not only in criminal, but in juvenile cases. (*In re M.P.* (2013) 217 Cal.App.4th 441, 455.)

3. Other confidential records and in camera proceedings from which one or more parties were excluded in the superior court [§ 3.9]

Except for a probation report or records pertaining to a confidential informant, transcripts and documents related to other kinds of in camera proceedings from which one party or more parties were excluded are transmitted only to the reviewing court and any party who had access in the superior court. (Cal. Rules of Court, rule 8.45(d)(2).) An

¹⁷ Caregiver addresses are often found on orders regarding the parents' educational rights, and on proofs of service.

¹⁸ *People v. Marsden* (1970) 2 Cal.3d 118 (motion to remove appointed counsel because of failure to provide effective assistance).

¹⁹ http://www.adi-sandiego.com/practice/conf_records.asp#marsden

example might be a [Pitchess motion](#)²⁰ or a diagnostic report under Penal Code section 1203.03. The parties on appeal will receive an index of the proceedings showing the date and persons present, but not the substance of the matter. (Rule 8.45(c).)

A record pertaining to a motion for disclosure of a [confidential informant](#)²¹ is sent to the reviewing court only, even though the People had access to it below. (Cal. Rules of Court, rule 8.45(d)(3); see Evid. Code, §§ 1041, 1042.)

A probation report is sent to the reviewing court, the People, and counsel for the defendant who is the subject of the report. (Cal. Rules of Court, rule 8.45(d)(4); see Pen. Code, § 1203.05.²²)

4. Sealed records [§ 3.9A]

Sealed records are those made confidential by court order on a case by case basis, rather than by law. (Cal. Rules of Court, rules 8.45(b)(3), 8.46(a), 2.550-2.551.) The records may be closed to public inspection or to inspection by other parties, as well. (Rule 8.45(b)(3).)

The court making the order must weigh the need for confidentiality against the public's First Amendment right to access to court records, according to criteria set out in California Rules of Court, rule 2.550(d) and *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. (See also Code Civ. Proc., § 124.)

Records sealed in the trial court remain sealed on appeal unless the reviewing court orders otherwise. (Cal. Rules of Court, rule 8.46(b)(1).)

²⁰*Pitchess v. Superior Court* (1974) 11 Cal.3d 531: defense motion for disclosure of complaints of misconduct made against an officer, when potentially relevant to the defense. (Evid. Code, §§ 1043-1047; Pen. Code, §§ 832.5, 832.7, 832.8; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1227.) More guidance is at http://www.adi-sandiego.com/practice/conf_records.asp#pitchess .

²¹http://www.adi-sandiego.com/practice/conf_records.asp#motions

²²An exception to the general rule of access on appeal to those who had access below is necessary in this situation, because a probation report is public until 60 days after sentencing. (Pen. Code, § 1203.05.)

Records not sealed by the trial court may be sealed on order of the appellate court under California Rules of Court, rule 8.46(d), which prescribes the procedures for obtaining a sealing order, lodging a record conditionally under seal, making an order, and dealing with the records. ADI's website has a [sample motion to seal](#).²³ A sealing order must state the findings required by rule 2.550(d) and comply with rule 2.550(e). If the court denies the motion to seal, the document is returned unless within 10 days the party asks it be filed. (Rule 8.46(d)(7).)

Unsealing a record is governed by rule 8.46(e). The party seeking unsealing makes a motion to the reviewing court, showing why sealing is no longer justified under rule 2.550.²⁴ A [sample motion to unseal](#) is on the ADI website.²⁵

Matters in briefs and other publicly filed documents must not disclose the contents of the sealed records. (Cal. Rules of Court, rule 8.46(f).) The general procedure is to file a public redacted document and an unredacted, complete version. The documents must be labeled as required in rule 8.46(f)(2) [record already sealed] or (f)(3) [record lodged conditionally under seal].) [Sample motions to file under seal](#) are on the ADI website.²⁶

5. Improper inclusion of identification information and other confidential matters in record [§ 3.10]

Sometimes material that is not supposed to be in the record is inadvertently included. For example, by law the transcripts must not include the names, addresses, or telephone numbers of sworn jurors; jurors must be referred to by an identifying number.²⁷

²³http://www.adi-sandiego.com/practice/forms_samples.asp

²⁴http://www.adi-sandiego.com/practice/forms_samples.asp

²⁵http://www.adi-sandiego.com/practice/forms_samples.asp

²⁶http://www.adi-sandiego.com/practice/forms_samples.asp

²⁷The information for unsworn jurors (such as those excused) must not be sealed unless the court finds compelling reason to do so (Code Civ. Proc., § 237, subd. (a)(1); rule 8.332(c)), but by policy unsworn jurors should be identified only by first name and initial.

If access to juror identification information is required to handle the case, counsel

(Code Civ. Proc., § 237, subd. (a)(2); Cal. Rules of Court, rule 8.332(b).) Other examples might be confidential juvenile records (see, generally, Welf. & Inst. Code, § 827; rule 8.401) and confidential transcripts (rules 8.45, 8.47).

Upon discovering material that counsel may not be entitled to see, counsel should stop reading that part of the transcript immediately and notify the Court of Appeal and ADI. The court may order return of the records, redaction, or other corrective action. Under no circumstances should counsel send such uncorrected material to clients or other persons without specific authorization from the court or ADI. *Under no circumstances should counsel send such material to clients or other persons without specific authorization from the court or project.*

If the material is appropriate for counsel to review, but not the client, counsel may redact the transcript in order to send it to the client, completely covering the confidential information, if practical. If the changes are more extensive, counsel may ask the court to order the court clerk to prepare a proper copy. If the record is in electronic form, having the clerk do the corrections may be the only alternative.

E. Request for Additions to Record Before It Is Filed in Reviewing Court
[§ 3.11]

Rule 8.324 of the California Rules of Court prescribes procedures for requesting materials not in the normal record, if the record has not yet been certified and transmitted to the reviewing court.²⁸ Ordinarily, trial counsel should make such a request in the superior court when filing a notice of appeal or as soon thereafter as possible, but in practice trial counsel seldom do so.

California Rules of Court, rule 8.324(b) provides:

Either the People or the defendant may apply to the superior court for inclusion in the record of any of the following items:

may apply to the trial court under Code of Civil Procedure section 237, subdivisions (b)-(d).

²⁸California Rules of Court, rule 8.340 prescribes procedures for changes to the record after it is filed in the reviewing court. (See § [3.12](#) et seq., *post*, on corrections and augmentations, and § [3.25](#), *post*, on exhibits.)

- (1) In the clerk's transcript: any written defense motion granted in whole or in part or any written motion by the People, with supporting and opposing memoranda and attachments;
- (2) In the reporter's transcript:
 - (A) The voir dire examination of jurors;
 - (B) Any opening statement; and
 - (C) The oral proceedings on motions other than those listed in rule 8.320(c).

Rule 8.407(c) of the California Rules of Court has analogous provisions for requesting additional records in the juvenile court before the record is filed in juvenile appeals.

F. Correcting/Completing and Augmenting Record After It Is Filed in Reviewing Court [§ 3.12]

Counsel has the responsibility for reviewing all relevant parts of the filed record and ensuring the record is adequate to support all issues raised. If the record delivered to counsel is inadequate in any respects, counsel must take action either to correct or augment it for the needed materials. "Correction" or "completion" is used when parts of the normal record are missing from the filed record. "Augmentation" is used when counsel needs material that is not a prescribed part of the normal record.

Counsel should make review of the record in order to complete it an *early* priority, because courts may be disinclined to delay the case well into the briefing and/or decisional process to add to the record. Some courts have local rules or miscellaneous orders setting deadlines for these requests. (See § 3.18, *post.*) To give themselves time for this responsibility, they should *always* monitor their cases on the [court website](#)²⁹ and sign up immediately for automatic email notification of developments, including the filing of the record.

See [CAVEAT](#) at the beginning of this chapter for possible electronic filing exceptions to the rules that follow.

²⁹<http://appellatecases.courtinfo.ca.gov/search.cfm?dist=0>

1. Correcting omissions from normal record [§ 3.13]

Appellate counsel in reviewing the record may notice that matters required by California Rules of Court, rule 8.320(b) or (c) are not included. Rule 8.340(b) provides in relevant part:

If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule or order requires included, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript. Without the need for a court order, the clerk must promptly send the document or transcript – as an augmentation of the record – to [the reviewing court, the probation officer, the defendant, and the Attorney General and/or district attorney].

Similar provisions apply to juvenile appeals. (Cal. Rules of Court, rules 8.410(a), 8.416(d)(1).)

a. Examples of often omitted materials [§ 3.14]

Any matter prescribed for the normal clerk’s transcript or reporter’s transcript may occasionally be omitted. Certain items, however, are chronically overlooked, and counsel should be especially alert for them.

One example is the written transcript of any electronic recording provided to the trial court under California Rules of Court, rule 2.1040,³⁰ which is a required part of the clerk’s transcript. (Rule 8.320(b)(11).) Another example is any packet of records offered to prove prior convictions under Penal Code section 969b. (Rule 8.320(b)(13)(C).) If these materials were before the superior court but are missing from the appellate record, counsel should request them by means of a rule 8.340(b) letter. Another frequently forgotten item is the record covering developments during the appeal. (See §§ [3.16](#) and [3.23](#), *post.*)

³⁰Rule 2.1040 requires a party offering an electronic recording at trial to provide a written transcript of the recording, unless the trial judge orders otherwise. If a transcript of a recording was not provided to the superior court under rule 2.1040, counsel should consult with the assigned staff attorney on how to proceed.

b. Correction procedure [§ 3.15]

In criminal or non- fast-track juvenile cases, if seeking *only* to correct an omission in the normal record (not also to augment), counsel should send a letter to the superior court clerk specifically referring to California Rules of Court, rule 8.340(b) or 8.410(a) and stating what portions of the normal clerk's and/or reporter's transcripts are missing; an augmentation request in the Court of Appeal is not necessary or appropriate. The letter should describe the missing portions as specifically as possible as to dates, names of reporters, titles of documents, etc. The appeals section of the superior court will prepare and transmit the missing portion of the normal record upon receipt of counsel's letter. In the Fourth Appellate District counsel should send a copy of the letter to ADI. (Some Courts of Appeal also want a copy; counsel should check with the assigned staff attorney.) Requests filed after the opening brief should be served on opposing counsel. A [sample correction letter](#)³¹ is on the ADI website.

Correction in fast-track juvenile cases is governed by California Rules of Court, rule 8.416(d). Some courts may prefer corrections be handled by augmentation, rather than standard correction processes.

Division One has a [form](#) for notifying the Court of Appeal of missing items from the transcripts in fast-track dependency cases.³²

If seeking *both* correction of the normal record and augmentation to include materials not in the normal record (see §§ [3.21](#), [3.24](#), and [3.35](#), *post*), counsel must follow local court practices. In the Fourth Appellate District counsel should include all requests in the application for augmentation filed in the Court of Appeal; a separate letter under rule 8.340(b) or 8.410(a) of the California Rules of Court may not be necessary.³³

The appellate court may not automatically extend time for the brief on learning a correction is underway. Because a California Rules of Court, rule 8.340(b) or 8.410(a)

³¹http://www.adi-sandiego.com/practice/forms_samples.asp

³²http://www.courts.ca.gov/documents/not_inc_juv_rec.pdf. See **CAVEAT** at the beginning of this chapter for possible electronic filing exception.

³³The Court of Appeal has authority to order correction as well as augmentation of the record. (Rules 8.340(c), 8.410(b).)

letter request is directed to the superior court and no action is required by the appellate court, it cannot be combined with a request to extend time, but counsel can send the Court of Appeal a separate extension request and use the pending record correction as a reason for needing it. Some courts grant an extension request until a certain number of days after the filing of the corrected record; others require periodic extension requests while the corrected record is being compiled (although the correction rarely takes more than a month).

c. Records of proceedings that occur during appeal [§ 3.16]

When during the appeal the trial court amends or recalls the judgment or makes an order such as one affecting the sentence or probation, California Rules of Court, rule 8.340(a) requires the superior court clerk to send an augmentation including the record of the new proceedings. In juvenile cases the clerk must notify those who received a copy of the record of such orders. (Rule 8.410(b)(2).) Clerks rarely remember this step.

Counsel should keep an eye out for such a development by maintaining regular contact with trial counsel and should seek addition of the record on such proceedings to the appellate record when the occasion requires. (Although rule 8.340(a) speaks of the additional record as an “augmentation,” the requirement of adding it to the appellate record is automatic, without court order. A rule 8.340(b) correction request, rather than a rule 8.340(d) augment request, should therefore be sufficient. A sample form, “Correction of Record – Later Order in Trial Court,” is on the ADI [forms and samples page](#).³⁴ (See also § 3.23, *post*.)

2. Augmenting the record after it is filed in reviewing court [§ 3.17]

Augmentation is used to obtain materials not in the normal record after the record is certified and transmitted to the reviewing court. This process is governed by California Rules of Court, rule 8.155(a). (Rules 8.340(d), 8.410(b)(1), 8.416(d); see also *People v. Gaston* (1978) 20 Cal.3d 476, 482-484, *People v. Silva* (1978) 20 Cal.3d 489, 492-493, and *People v. Barton* (1978) 21 Cal.3d 513, 518-520.) Requests for additional record

³⁴http://www.adi-sandiego.com/practice/forms_samples.asp

should be submitted to the Court of Appeal, not the superior court, once the record has been filed.³⁵

a. Timing of request [§ 3.18]

Requests to augment or complete the record should be filed as soon as possible after receiving the record and determining that the additional material is needed – almost always before the original opening brief due date. The general expectation is that a request should be filed within 40 days of the later of the filing of the record or the appointment in criminal cases and within 15 days in fast-track dependency cases (Cal. Rules of Court, rule 8.416(d)(2)).³⁶

b. Identification of materials in request [§ 3.19]

In identifying the documents or reporter’s transcript sought, counsel should not just ask for “materials relevant to [a particular issue]” or use other such generalities. The exact record needed should be described with enough detail (dates and nature of proceedings, titles and filing dates of documents, etc.) that the reporter or clerk will not have to guess. (See Cal. Rules of Court, rules 8.340, 8.410, 8.155.)

For augmentation of the clerk’s transcript, if the material is not lengthy, counsel may obtain a copy of the document from the superior court clerk, attach the copy to the request to augment, and ask the Court of Appeal to order the copy be made part of the record without preparation of a formal supplemental clerk’s transcript. (Cal. Rules of

³⁵Rules 8.324 and 8.407(c) of the California Rules of Court govern additions to the normal record *before* it is certified in criminal and delinquency matters. (See § [3.11](#), *ante*.)

³⁶See ADI News Alerts of January 14 and February 4, 2011.
http://www.adi-sandiego.com/news_alerts/index.asp

Court, rule 8.155(a)(2).³⁷ A copy of the augmentation material must be included with the copy of the augmentation request served on opposing counsel. If the augmentation documents are so extensive that a supplemental clerk's transcript will be required, each item should be described as specifically as possible, including the title of the document and the date it was filed. (See rules 8.340, 8.410, 8.155.)

A request to augment the reporter's transcript must describe the nature of the oral proceedings. The date, time, judge's name, and reporter's name (with CCSR number if available) should be provided, along with a citation to the portion of the clerk's transcript and/or reporter's transcript that refers to the requested proceeding. (See Cal. Rules of Court, rules 8.130(a)(4), 8.155(a)(3).)

c. Explanation of need for materials [§ 3.20]

The request must include a brief statement of why the augmentation is necessary or relevant to the appeal. (See Cal. Rules of Court, rules 8.155, 8.50, 8.54, 8.340; 8.410; *People v. Hagan* (1962) 203 Cal.App.2d 34, 39-40 [defendant not entitled to augmentation of record in absence of showing of good cause].) It should describe the general issue to which the augmented record relates and demonstrate, with references to the present record when available, that the material to be augmented was before the superior court judge. For example, a request might refer to court minutes showing denial of a challenge to a juror for cause in seeking augmentation of the reporter's transcript to include the jury voir dire.

d. Concurrent request for extension of time [§ 3.21]

If a supplemental transcript will have to be prepared, delay in filing the brief can be anticipated. Counsel's request to augment the record should therefore include or be accompanied by a request to extend time to "30 days after the supplemental record is filed"; court policy may vary on whether the requests should be separate or combined. If the requests are combined, the *title* of the combined document should clearly indicate both types of requests. (See also § [3.15](#), *ante*, and § [3.35](#), *post*.)

³⁷The rule does not require the copy to be certified by the superior court clerk, although it is always proper to ask for a certified copy.

e. Formal requirements [§ 3.22]

Sample augmentation and extension [forms](#), including combinations of those, are on the ADI website.³⁸ An augmentation request must comply with rule 8.54 of the California Rules of Court, on motions. The formal requirements for such requests are outlined in ADI's [filing and service chart](#)³⁹ – including such matters as content, service, filing, any deadlines or formal policies, and oppositions.

See [CAVEAT](#) at the beginning of this chapter for possible electronic filing exceptions to these rules.

f. Changes in judgment or other new orders made after record is certified [§ 3.23]

In a criminal case, if, during the pendency of the appeal and after the record is certified, the trial court amends or recalls the judgment or makes any new order in the case (such as an order affecting the sentence or probation), the superior court clerk must send copies of the amended abstract of judgment or new order and related proceedings, to the reviewing court and the parties as an augmentation of the record on appeal. (Cal. Rules of Court, rule 8.340(a).) In practice, it is easy for clerks to overlook this rule; appellate counsel should keep in close touch with the client and trial counsel to find about such developments and remind the superior court clerks of their duty. (Although rule 8.340(a) speaks of the additional record as an “augmentation,” the requirement of adding it to the appellate record is automatic, without court order. A rule 8.340(b) correction request, as opposed to a rule 8.340(d) augment request, should therefore be sufficient to request the material. See § [3.16](#), *ante*.)

In juvenile cases, the lower court must notify the reviewing court of the change. (Cal. Rules of Court, rule 8.410(b)(2).) A motion for augmentation would be required.

³⁸http://www.adi-sandiego.com/practice/forms_samples.asp

³⁹http://www.adi-sandiego.com/pdf_forms/APPLICATIONS_MOTIONS_AND_MISC_DOCUMENTS.pdf

3. Combining requests for correction and augmentation [§ 3.24]

If both an augmentation and correction of the record are needed, in at least some districts all of the items should be included in a single augmentation request; a separate California Rules of Court, rule 8.340(b) or 8.410(a) letter is not necessary. (The assigned staff attorney should be consulted for local policy on this matter.)

G. Getting Exhibits Before the Reviewing Court [§ 3.25]

Exhibits are part of the record under California Rules of Court, rules 8.320(e) and 8.407(f) and therefore need not be augmented into the record. Unless an exhibit is included in the clerk's transcript, however, the court will not have physical access to it. If counsel wants the court to see it, the exhibit must affirmatively be brought before the court.

Counsel have a professional responsibility to view exhibits that are potentially critical to the appeal. In some circumstances a project staff attorney can view exhibits on behalf of a panel attorney and make copies. The assigned staff attorney can provide guidance on the procedures for viewing exhibits.⁴⁰ Anna Jauregui-Law's article on *[De-mystifying the Exhibit Review Process in Criminal Cases](#)*⁴¹ gives comprehensive guidance for Fourth Appellate District cases.

1. Attachment to brief [§ 3.26]

A copy of some exhibits may be obtained from trial counsel. Certain exhibits, typically documentary exhibits on letter size paper, may be copied by the clerk if necessary. Copies of exhibits may be attached to a brief if the attachments do not exceed a total of 10 pages, but the presiding justice may permit a longer attachment for good cause. (Cal. Rules of Court, rule 8.204(d).) Exhibits incapable of being copied must be transmitted under rule 8.224. (See § [3.27](#), *post*.)

⁴⁰See July 2003 ADI newsletter on viewing exhibits, pages 4-7 at http://www.adi-sandiego.com/news_alerts/pdfs/bef2005/2003_july.pdf

⁴¹http://www.adi-sandiego.com/news_alerts/pdfs/2010/EXHIBIT-REVIEW-UPDA TED-2010.pdf

2. Transmission under rule 8.224 [§ 3.27]

Counsel may request an exhibit be transmitted to the court under rule 8.224,⁴² which describes the formal method to have exhibits transmitted to the Court of Appeal. (Cal. Rules of Court, rules 8.320(e), 8.407(f).) The court may also order transmission on its own under rule 8.224. Some courts may prefer other times and methods of transmission; the assigned staff attorney can inform counsel of local variations. An example is the Fourth Appellate District, Division Two, which prescribes its own procedures and provides a form.⁴³

H. Agreed and Settled Statements and Motion for New Trial [§ 3.28]

1. Agreed statement [§ 3.29]

Agreed statements are used, by mutual consent of the parties, in lieu of a normal record or part of the record. They are permitted by California Rules of Court, rules 8.344 and 8.407(d) (e.g., *People v. One 1964 Chevrolet Corvette Convertible* (1969) 274 Cal.App.2d 720) but are rare. An agreed statement must conform to rule 8.134, which prescribes contents and procedures, except for the special filing requirement set out in rule 8.344.

2. Settled statement [§ 3.30]

Settled statements replace unavailable parts of the record. The procedures for obtaining a settled statement are set forth in California Rules of Court, rule 8.346 (see also rule 8.407(d)):

(a) **Application**

As soon as a party learns that any portion of the oral proceedings cannot be transcribed, the party may serve and file in superior court an application for

⁴²Some courts may prefer other times and methods of transmission; counsel should ask the assigned staff attorney about local variations. Some courts provide a form for requesting exhibits. See also **CAVEAT** at the beginning of this chapter for possible electronic filing exceptions.

⁴³http://www.adi-sandiego.com/practice/fourth_dist_div2.asp#superior2

permission to prepare a settled statement. The application must explain why the oral proceedings cannot be transcribed.

(b) Order and proposed statement

The judge must rule on the application within five days after it is filed. If the judge grants the application, the parties must comply with the relevant provisions of rule 8.137, but the applicant must deliver a proposed statement to the judge for settlement within 30 days after it is ordered, unless the reviewing court extends the time.

(c) Serving and filing the settled statement

The applicant must prepare, serve, and file in superior court an original and three copies of the settled statement.

A settled statement is used to ensure the record on appeal conforms to the actual proceedings in the trial court. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 585; see also *People v. Pinholster* (1990) 1 Cal.4th 865, 922 [settled statement of unreported bench conferences between court and counsel].) It may not be used to change the evidence – e.g., to improve on the quality of a sound recording introduced below. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 440-441; see also *People v. Tuilaepa, supra*, at p. 585 [settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues they neglected to pursue earlier].)

The settlement process is typically initiated in the superior court. Rules 8.346 and 8.137, as outlined above, govern. (See also rule 8.407(d) (juvenile rule), which refers to rules 8.344 and 8.346.) A [sample request](#) is on ADI’s website.⁴⁴

But an alternative route is available in the Court of Appeal. A party may move to have the record corrected under rule 8.340(c) or 8.410(b)(1), as provided under rule 8.155(c)(1) & (2). A [sample request](#) is on ADI’s website.⁴⁵ The correction can be also done by stipulation. (Rule 8.155(c)(1).) Under rule 8.155(c)(2), the reviewing court may order the superior court to settle disputes about omissions or errors in the record.

See [CAVEAT](#) at the beginning of this chapter for possible electronic filing exceptions to these procedures.

⁴⁴http://www.adi-sandiego.com/practice/forms_samples.asp

⁴⁵http://www.adi-sandiego.com/practice/forms_samples.asp

3. Motion for new trial under Penal Code section 1181, subdivision 9
[§ 3.31]

The use of a settled statement is typically confined to the loss of a comparatively small portion of the reporter's transcript of matters heard before the trial court alone. The loss of a significant portion of the record could be cause for filing in the reviewing court a motion for new trial under Penal Code section 1181, subdivision 9. (*In re Stephen B.* (1979) 25 Cal.3d 1; see *People v. Cervantes* (2007) 150 Cal.App.4th 1117.) If the appeal can be resolved fairly without the transcript, a new trial is not in order. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1381-1382; *People v. Pinholster* (1992) 1 Cal.4th 865, 921-922, and cases cited.)

III. REQUESTS FOR EXTENSION OF TIME [§ 3.32]

Requests for extension of time in criminal appeals are governed by California Rules of Court, rules 8.50, 8.60, 8.63, 8.360(c)(4), 8.412(d), and 8.416(g). Extensions are used primarily for the appellant's opening brief and respondent's brief and sometimes for the reply brief. They are not available for petitions for rehearing or review, although the last-gasp measure of relief from default can be sought. (Rules 8.268(b)(4) & (c), 8.500(e)(2).) Counsel should note that extension requests must be received by the clerk's office on or before the due date; unlike briefs or certain petitions, they are not considered timely if merely mailed by that date. (Rule 8.25(b).⁴⁶)

See [CAVEAT](#) at the beginning of this chapter for possible electronic filing exceptions to the rules and procedures described in this section.

⁴⁶The mail filing rule applies to priority or express mailing of a brief, petition for rehearing, answer to a petition for rehearing, petition for review, answer to a petition for review, or reply to an answer to a petition for review. (Rule 8.25(b)(3).)

A. Number of Extensions [§ 3.33]

In most criminal cases, one or two 30-day⁴⁷ extensions for filing the appellant's opening brief are fairly routinely granted, although counsel should consult the assigned staff attorney for current local policies. The courts may entertain more than two extensions, especially in very long record cases, but counsel must specify with particularity the need for additional time. (See § 3.34, *post*.) Extensions are stricter in juvenile cases, especially fast-track dependency appeals under California Rules of Court, rule 8.416.

If an extension has not been granted and no opening brief is filed by the due date, in a criminal, delinquency, or non-fast-track dependency case, the court will issue a notice that if the brief is not filed within 30 days and counsel is appointed, new counsel may be appointed or, if counsel is not appointed, the case may be dismissed. (Cal. Rules of Court, rules 8.360(c)(5)(A), 8.412(d)(1)(B).) In practice, an order relieving counsel for failure to file a brief is “without compensation,” at least in the Fourth District; the issuance of such an order puts the attorney's panel status in severe jeopardy and likely terminates it.

In fast-track cases, the “grace” period is 15 days (Cal. Rules of Court, rule 8.416(d)); the court may require any extension of time waive some or all of this period (see § 3.34, *post*).

If the late brief is the respondent's, the notice will say the case may be decided on the basis of the record, the appellant's opening brief, and argument by the appellant. (Cal. Rules of Court, rules 8.360(c)(5)(B), 8.412(d)(1)(B).)

The court may impose the specified sanction at the appropriate time. (Cal. Rules of Court, rules 8.360(c)(6), 8.412(d)(2).)

B. Grounds for Extension [§ 3.34]

Extensions of time will be granted only upon a showing of good cause in criminal, delinquency, and non-fast-track dependency cases. (Cal. Rules of Court, rules 8.60, 8.63, 8.360(c), 8.412(c).) In juvenile fast-track cases, extensions require an “exceptional

⁴⁷On occasion, when counsel knows that 30-day extensions will be inadequate because, for example, the case has a very long record, extensions may be requested in larger increments.

showing of good cause” (rule 8.416(f); Code Civ. Proc., § 45); some courts may require counsel to waive all or part of the 15-day “grace” period under rule 8.416(g) (see § [3.33](#), *ante*) as a condition of getting an extension of time on the brief.

Acceptable reasons for requiring more time are illustrated in California Rules of Court, rule 8.63(b). Such reasons include work on other appointed appeals (case names and numbers, deadlines, previous extensions, etc., should be listed), facts about the current case like record length and the number and complexity of issues, and other matters that as a practical matter preclude timely filing without undue impairment of quality. *A general “press of business” excuse is not acceptable.* (Rule 8.63(b)(9).) Considerably heightened standards apply to dependency fast-track cases under rule 8.416(f), and stronger reasons are needed to establish the “exceptional showing of good cause” required by rule and statute.

A common – though by no means universal – policy is to require special justification for more than two extensions. Two 30-day extensions may, however, be excessive given the special needs of the case – for example, fast-track cases under rule 8.416, cases in which immediate custody is at stake, and other time-sensitive situations.⁴⁸ Often, the time available will be limited to a short extension, and multiple extensions will be denied.

Counsel must not give as an excuse that a *Wende-Anders* or *Sade C.* brief⁴⁹ is contemplated or that ADI is reviewing the record for that purpose. Such a statement tends to disparage any merits issues ultimately raised. Similarly, if counsel needs time to explain to the client potential adverse consequences from pursuing the appeal, the existence and nature of such consequences should not be mentioned. Other prejudicial matters might include time spent looking for a fugitive client (could lead to dismissal of

⁴⁸For ways of achieving faster resolution than the normal appeal would afford, see [chapter 1](#), “The ABC’s of Panel Membership: Basic Information for Appointed Counsel,” § 1.30 et seq. on “Protecting the Client in Time-Sensitive Cases.”

⁴⁹A *Wende-Anders* brief is filed when counsel can find no arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436; see also *Anders v. California* (1967) 386 U.S. 738; *In re Sade C.* (1996) 13 Cal.4th 952.) Such briefs are discussed in more detail in § 1.24 et seq. of [chapter 1](#) of this manual, “The ABC’s of Panel Membership: Basic Information for Appointed Counsel,” and § 4.73 et seq. of [chapter 4](#), “On the Hunt: Issue Spotting and Selection.”

appeal); difficulties in dealing with client (could disparage client); and numerous other situations. Counsel should describe the need for more time in generalities that could not work to the client's detriment. If it is unavoidably necessary to provide some detail to support the amount of time required for a potentially prejudicial matter, counsel may put it in a confidential memo to ADI.

In all extension requests counsel should advise the court in simple terms of the progress made toward preparation of the brief. Counsel should use discretion and not go into great detail regarding illnesses or other personal circumstances.

C. Extensions Pending Augmentation or Correction of the Record [§ 3.35]

If an augmentation may delay the brief, the augment request may be accompanied by an extension request to, for example, "30 days after the supplemental record is filed." Court policy may vary on whether the requests should be separate or combined. If the requests are combined, the *title* of the combined document should clearly indicate both types of requests. (See §§ [3.21](#), [3.24](#), *ante.*)

Because a California Rules of Court, rule 8.340(b) or 8.410(b)(1) letter request is directed to the superior court and no action is required by the appellate court, a rule 8.340(b) or 8.410(b)(1) letter request cannot be combined with a request to extend time, but counsel can send the Court of Appeal a separate extension request and use the pending record correction as a reason for needing it. Some courts grant an extension request until a certain number of days after the filing of the corrected record; others require periodic extension requests while the corrected record is being compiled. The decision may depend on the magnitude of the correction needed, counsel's ability to work on other parts of the case before getting the correction, etc.

See [CAVEAT](#) at the beginning of this chapter for possible electronic filing exceptions to these rules and procedures.

D. Contents and Form of Extension Request [§ 3.36]

A [sample extension request](#) is on the ADI website.⁵⁰ This form is the preferred format for extension requests in the Fourth Appellate District. It includes the present and proposed due dates; the number of previous requests; previous notice, if any, under

⁵⁰http://www.adi-sandiego.com/practice/forms_samples.asp

California Rules of Court, rule 8.360(c)(5) or 8.412(d); the dates counsel was appointed and the record was filed; and the reasons for extending time.

Important filing requirements under the California Rules of Court include these steps:

- File with the Court of Appeal an original and one copy, plus copies for the appellate project, opposing counsel (usually, the Attorney General), and all other parties involved in the appeal (such as co-appellants). (Rule 8.44(b)(7).)
- Show proof of service on opposing counsel and any other parties involved in the appeal. (Rules 8.25(a), 8.50(a).)
- Include self-addressed stamped envelopes for oneself, opposing counsel, and all other parties. (Rule 8.50(c).)⁵¹
- Include the name, address, telephone number, and State Bar number of counsel on the first page of the document. (Rules 8.204(b)(10)(D), 8.40(c).)

The court's order will typically be stamped directly on the request.⁵² One copy will be mailed back to counsel in the envelope counsel has provided; the court will forward the additional copies to opposing counsel, the appellate project, and any other parties

⁵¹In some districts such as the Fourth, the Court of Appeal may forward its ruling on the motion to the Attorney General and the appellate project in its daily packet to each, and therefore no prepaid, preaddressed envelope to those entities is required. (Counsel should consult the district project for local practices.) If the district attorney instead of the Attorney General is representing the People, a prepaid envelope addressed to the district attorney is required under rule 8.50(c).

⁵²In the Fourth Appellate District, Division Two, for rulings on second and subsequent extension requests, the court issues its own separate order.

involved in the appeal. Counsel should also always monitor the Court of Appeal [website](#) for the order.⁵³

See [CAVEAT](#) at the beginning of this chapter for possible electronic filing exceptions to the preceding rules and procedures.

IV. RELEASE PENDING APPEAL [§ 3.37]

The California Constitution provides for the right to bail subject to specified exceptions. (Cal. Const., art. I, § 12.) The applicable statutory provisions for release pending appeal are Penal Code sections 1272 and 1272.1, discussed in § [3.38](#) et seq., *post.*) Proceedings in the appellate court after unsuccessful application in the trial court are governed by California Rules of Court, rule 8.312. The possibility of release pending decision is also available on habeas corpus. (Pen. Code, § 1476.)

Although release pending appeal is not common, under some circumstances appellate counsel may have an obligation to seek it or assist the client or trial counsel in doing so. Indeed, in some cases it may be crucial to preserve even the possibility of meaningful appellate relief. (See § 1.30 et seq. of [chapter 1](#), “The ABC’s of Panel Membership: Basic Information for Appointed Counsel,” on methods of ensuring timely relief.)

Money bail is one possible method to effect release on appeal. The courts may impose alternative conditions to assure a defendant’s presence at all necessary proceedings. (*People v. Overstreet* (1986) 42 Cal.3d 891, 898; *In re Pipinos* (1982) 33 Cal.3d 189, 192, fn. 1.)

Release pending appeal may also be sought when the client is ordered to serve time in county jail as a condition of probation. (*People v. McNiff* (1976) 57 Cal.App.3d 201, 205.)

⁵³Monitor cases at <http://appellatecases.courtinfo.ca.gov/index.html> Some older cases and some that require confidentiality may not be posted.

A. Standards [§ 3.38]

1. Eligibility for release [§ 3.39]

Penal Code section 1272 governs eligibility for release pending appeal:

After conviction of an offense not punishable with death, a defendant who has made application for probation or who has appealed may be admitted to bail:

1. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing a fine only.
2. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing imprisonment in cases of misdemeanors.
3. As a matter of discretion in all other cases, except that a person convicted of an offense subject to this subdivision, who makes a motion for release on bail subsequent to a sentencing hearing, shall provide notice of the hearing in the bail motion to the prosecuting attorney at least five court days prior to the hearing.

Release pending appeal is thus at the discretion of the court in most felony cases. (Pen. Code, § 1272, subd. 3.)

There are exceptions to the eligibility provisions of these sections. For example, convicted felons who have been placed on a “parole hold” are not entitled to release pending appeal even though the alleged offense triggering the hold is a bailable offense, because the Board of Parole Hearings has exclusive jurisdiction over parolees. (Pen. Code, §§ 3040, 5077; *In re Law* (1973) 10 Cal.3d 21, 24-25; see also *In re Fain* (1983) 145 Cal.App.3d 540, 548.) Juvenile offenders also are not entitled to release pending appeal on the theory that juvenile court procedures contain adequate substitutes for bail. (Welf. & Inst. Code, § 628 et seq.; *In re Talbott* (1988) 206 Cal.App.3d 1290, 1293; *Aubry v. Gadbois* (1975) 50 Cal.App.3d 470, 473-475.)

2. Considerations for court in exercising discretion whether to grant release pending appeal [§ 3.40]

In *In re Podesto* (1976) 15 Cal.3d 921, the California Supreme Court held that in exercising its discretion whether to grant release pending appeal, the superior court “may

consider (1) the likelihood of the defendant's flight, (2) the potential danger to society posed by the defendant's release, and (3) the frivolousness or lack of diligence in defendant's prosecution of his appeal." (*Id.* at p. 933.) Penal Code section 1272.1 incorporates the standards set out in *Podesto* and *In re Pipinos* (1982) 33 Cal.3d 189.

Penal Code section 1272.1 also requires the court to include a brief statement of reasons in support of its order granting or denying a motion for release pending appeal, so that an appellate court can determine whether discretion was properly exercised. (See *In re Christie* (2001) 92 Cal.App.4th 1105, 1107.) "The statement need only include the basis for the order with sufficient specificity to permit meaningful review." (Pen. Code, § 1272.1, subd. (c).) *In re Podesto* (1976) 15 Cal.3d 921 and *In re Pipinos* (1982) 33 Cal.3d 189 provide guidance in interpreting this requirement. (See, e.g., *In re Hernandez* (1991) 231 Cal.App.3d 1260, 1262.)

a. Defendant is not likely to flee [§ 3.41]

Subdivision (a) of Penal Code section 1272.1 codifies the first *Podesto* requirement. The defendant must show by clear and convincing evidence that he or she is not likely to flee while released.

In determining whether the defendant is likely to flee the court must consider such factors as:

- The ties of the defendant to the community, including employment, duration of residence, family attachments, and property holdings. (Pen. Code, § 1272.1, subd. (a)(1).)
- The defendant's record of appearance at past court hearings or of flight to avoid prosecution. (Pen. Code, § 1272.1, subd. (a)(2).)
- The severity of the sentence. (Pen. Code, § 1272.1, subd. (a)(3).)

b. Defendant poses no danger [§ 3.42]

Under subdivision (b) of Penal Code section 1272.1, the defendant must show by clear and convincing evidence the release would not present a danger to any other person or to the community. In evaluating this matter, the court must consider, among other

factors, whether the crime for which the defendant was convicted was a violent felony as defined under Penal Code section 667.5, subdivision (c).⁵⁴

c. Appeal is good-faith and substantial [§ 3.43]

The defendant must demonstrate the appeal is not for the purpose of delay and raises a substantial legal question which, if decided in the defendant's favor, is likely to result in a reversal. (Pen. Code, § 1272.1, subd. (c).) Under subdivision (c) a "substantial legal question" is defined as "a close question, one of more substance than would be necessary to a finding that it was not frivolous." (See, e.g., *People v. McGuire* (1993) 14 Cal.App.4th 687, 702-703 [superior court acted within its discretion when it determined appeal presented a substantial legal question].) In making this assessment, the court is not required to determine whether it committed error. (Pen. Code, § 1272.1, subd. (c).)

B. Procedures [§ 3.44]

See [CAVEAT](#) at the beginning of this chapter for possible electronic filing exceptions to the following rules and procedures.

1. Initial application in superior court [§ 3.45]

A motion for release pending appeal or for a reduction of bail on appeal must be made to the superior court. (Cal. Rules of Court, rule 8.312(b).) If the motion is made after the sentencing hearing, the defendant must provide notice to the prosecution at least five court days before the hearing. (Pen. Code, § 1272, subd. 3.)

In most cases, trial counsel is in the best position to make the motion in the superior court. Trial counsel is most familiar with the facts of the case as well as other matters, such as whether the trial court might be favorably disposed to grant a motion for release pending appeal. Also, trial counsel will most likely be geographically close to the trial court.

⁵⁴Conviction of a violent felony is only one factor the court may use to determine whether the defendant poses a danger to the safety of others or the community. (*In re Hernandez* (1991) 231 Cal.App.3d 1260, 1261-1264 [writ petition seeking bail pending appeal denied where defendant, convicted of possessing for sale controlled substances and maintaining place where drugs were sold, did not show by clear and convincing evidence she was not a danger to community].)

However, the appellate attorney may be helpful in providing an opinion that a “substantial legal question” may be presented on appeal. If a motion for release pending appeal is clearly indicated and trial counsel will not or cannot make the motion, appellate counsel should file the motion in the superior court. (Appellate counsel should consult with the project attorney if personal appearances are necessary and counsel’s office is geographically distant from the trial court.)

2. Application in the appellate court [§ 3.46]

If dissatisfied with the superior court’s decision on the request for release pending appeal, the defendant may apply to the Court of Appeal. It must include a showing that the defendant sought relief in the superior court and the court unjustifiably denied the application or set bail so high as to amount to a denial of the motion. (Rule 8.312(b); see *People v. Remijio* (1968) 259 Cal.App.2d 12, 13 [high bail was denial of due process].) The application must be served on the district attorney and Attorney General. (Cal. Rules of Court, rule 8.312(c).) Normally an application for release pending appeal is made by motion, but a petition for writ of habeas corpus can also serve that function. (E.g., *In re Pipinos* (1982) 33 Cal.3d 189, 196-197; see § 8.55 of [chapter 8](#), “Putting on the Writs: California Extraordinary Remedies.”)

When the decision to grant release pending appeal is matter of a discretion (Pen. Code, § 1272, subd. 3), that decision is reviewed under an abuse of discretion standard. (*In re Christie* (2001) 92 Cal.App.4th 1105, 1107; *In re Hernandez* (1991) 231 Cal.App.3d 1260, 1262, 1264.)

The reviewing court may grant temporary release pending its ruling on the application for release during appeal. (Cal. Rules of Court, rule 8.312(d); e.g., *In re Fishman* (1952) 109 Cal.App.2d 632, 633.)

C. Considerations in Deciding Whether To Seek Release Pending Appeal [§ 3.47]

Determining whether an application for release pending appeal is appropriate is not a mechanical process, but requires sound professional judgment. Considerations include the legal merits of the motion and the underlying appeal and the client’s individual circumstances and wishes.

One factor is the likelihood of success in seeking release, given the statutory criteria and the facts in the particular case. Another is the likelihood of relief on the appeal itself.

Counsel must also consider the date the client is likely to be released from custody.⁵⁵ One of the main reasons for seeking release on appeal is to safeguard the possibility of meaningful relief for the client in time-sensitive cases and avoid the possibility the client might end up serving “dead” time – custody in excess of the lawful sentence – in the event of a favorable result on appeal. This might happen, for example, if the sentence is short, a reduction in sentence is probable, or substantial additional credits may be ordered.⁵⁶

If counsel determines release might be appropriate, counsel should consult with the client and explain the possible benefits and liabilities of seeking release. The client may want to post a bond or ask counsel to seek release on other conditions. (See, e.g., *In re Podesto* (1976) 15 Cal.3d 921, 925, fn. 1.)

Release pending appeal is not necessarily desirable in every situation, even if it is theoretically available. If the chances for relief are not strong, the client is often well advised to continue serving the term of imprisonment pending appeal, rather than facing the financial burden of posting bail or the disruption of returning to confinement after affirmance of the judgment on appeal. The decision to seek release should be made by the *client*, after full and informed consideration of the matter.

⁵⁵As a preliminary step during the initial review of the case following appointment, especially when the sentence is relatively short, appellate counsel should determine the client’s expected release date and calculate how that might be affected by a favorable ruling on appeal.

⁵⁶If counsel determines the case might indeed be time-sensitive, a number of options can be considered, in addition to or instead of release pending appeal. This topic is covered in § 1.30 et seq. of [chapter 1](#), “The ABC’s of Panel Membership: Basic Information for Appointed Counsel.”